BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: JERLANE, INC. dba COMMERCIAL BOX AND PALLET 1249 West Washington Avenue Escondido, California 92029 Employer	Docket Nos. 01-R3D2-4344 through 4348 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. This decision is rendered in response to a petition for reconsideration filed by Jerlane, Inc. dba Commercial Box and Pallet (Employer) in this matter.

Jurisdiction

Commencing on May 31, 2001, the Division of Occupational Safety and Health (the Division), through Associate Safety Compliance Officer Michael Loupe and Senior Safety Engineer Mariano Kramer, conducted an accident investigation at a place of employment maintained by Employer at 1249 West Washington Avenue, Escondido, California (the site). On October 10, 2001, the Division issued Employer five citations (one of which had five individual regulatory and general violations) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] Three of the citations were classified as serious, one was classified as willful/serious and the total proposed penalties were $86,800.

Employer filed timely appeals contesting a number of the alleged violations. Employer also raised the affirmative defenses of independent

[1] Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

employee action and lack of knowledge for some citations. For all citations Employer asserted the defense of financial hardship.

A hearing was held on November 21 and 22, 2002, in San Diego, California by an Administrative Law Judge (ALJ) of the Board. On March 11, 2003, the ALJ issued a decision denying Employer's appeal in part. Employer's appeal was partially granted on the section 3203(a)(7) violation and the total penalties were reduced to $72,100.

Employer filed a timely petition for reconsideration on April 14, 2003.[2] In the petition, Employer sought reconsideration of the ALJ's decision regarding the existence and classification of the section 4306(a) violation [under hung saws] and the penalty associated with it, the applicability of the Independent Employee Action and financial hardship defenses, and the remaining issues regarding the section 3203(a)(7) violation [IIPP training].

The Division answered Employer's petition on May 21, 2003 and the Board took the petition under submission on June 4, 2003. After the Board took the matter under submission, it remanded the case to the ALJ to address the issue of financial hardship relief in light of the Board's Decision After Reconsideration in *Stockton Tri Industries, Inc.,* Cal/OSHA App. 02-4946 Decision After Reconsideration (March 27, 2006), which was rendered while this petition was pending. A Decision After Remand issued on August 8, 2006 denying Employer financial hardship relief.

EVIDENCE

Employer manufactures and distributes pallets. On April 19, 2001, employee Alejandro Zepeda (Zepeda) severed two fingers on his right hand while operating a saw.

Zepeda usually worked in the assembly area of Employer's operation, but on the day of the accident, Octavio Cabrera (Cabrera), Employer's foreman, told him to assist another worker in the woodcutting area to cut 4' by 4's. When he finished the assignment, the other worker instructed Zepeda to return to the cutting area and make 45-degree cuts. While performing this task, Zepeda grabbed a 4' by 4' with his left hand, but the wood was poorly positioned so he pushed the wood a bit to the right with his right hand and cut off his fingers. His fingers could not be reattached.

Zepeda had operated the saw on two occasions. The first occasion was when Cabrera showed him how to make two cuts; the second occasion was at the time of his accident. Zepeda was never shown how to make corner cuts.

[2] We decline to grant Employer's request for oral argument pursuant to Title 8, Section 393(a).

He was aware of Employer's policy that employees were to receive training on a machine before using it, but it was not until after his accident that he received training on the saw in question.

Safety Compliance Officer Michael Loupe (Loupe) opened an accident investigation at Employer's site on May 31, 2001. Loupe spoke with one of the owners of the company, John Mason (Mason). He also interviewed Zepeda and the foreman, Octavio Cabrera.

Loupe opined that the saw in question was a "cut off saw" and Division Senior Safety Compliance Officer Mariano Kramer (Kramer), who accompanied Loupe during his initial inspection of the site, opined that the saw meets the definition of a "jump saw" under the American National Standard Institute provision on Woodworking Machinery, Safety Requirements, ANSI 01.1, section 2.2.1.4. (1992).[3] Loupe conceded that both descriptions fit the saw in question (hereinafter "the saw").

Loupe explained that in the rest position the saw blade remains underneath the table. When the foot pedal is depressed the blade protrudes vertically through a slit, the hood guard drops down to within four inches of the cutting surface, and then the blade rises up and cuts the wood. After the wood is cut, the blade retracts back down under the table.

Loupe and Kramer observed the saw in operation and both concluded that the saw was inadequately guarded above the table, because the hood guard left part of the blade exposed. Both men informed Mason of this deficiency, and Mason assured them that the saw would not be used until the problem was corrected.

On July 6, 2001, Loupe returned to Employer's site and observed the saw in operation with the same hazardous condition. At that time, Loupe posted an order prohibiting use. A few days later Loupe returned to Employer's site and observed that the hood had been retrofitted with an attachment. Although Employer had attempted to abate the exposure hazard, Loupe believed that the attachment would have to be removed or opened in order to make 45-degree cuts in the wood. If the attachment were removed, an employee's hands or fingers would again be exposed to the blade.

Loupe testified that Cabrera told him during the investigation that he

[3] Section 2.2.1.4 defines a "jump saw." The Board notes that the ANSI standard is not incorporated by reference in section 4306 and is not part of the regulation. The standard was introduced to assist in defining the saw in question and support the applicability of section 4306, which pertains to cut-off and jump saws. Employer may not be required to meet the standard's requirements, nor may Employer defend its actions based on the standard's specifications, except to the extent they are incorporated by reference into the Title 8 safety orders. Because we see no findings in the decision that are based on the ANSI standard, we find no error in the decision's reference to it.

(Cabrera) had no recollection of the guard ever being part of the cutting cycle and that the guard on the saw only worked sporadically for the six months prior to the accident. On the day before and the day of the accident, the saw guard was not working at all. Cabrera told Loupe that he was aware that something was wrong with the air system that operated the hood, and that it was missing an element that allowed the air system to work. Cabrera also told Loupe that the problem with the saw had been a topic at safety meetings at which Mason was present.

At hearing, however, Cabrera testified that he did not recall making many of the statements Loupe attributed to him and did not recall concerns regarding hazards related to the saw being raised at safety meetings. He did recall being told that the saw was not working properly and that cuts were not straight. Cabrera testified that he had operated the machine thousands of times prior to Zepeda's injury, that the yellow guard was not coming down, and that the guard was not working on the day of the accident.

Zepeda's co-worker, Simon Aguaro, testified that he worked for Employer for four years and that, for his first two years of employment, he operated the saw. During that time, the guard did not come down when the pedal was pressed. On at least one occasion when Mason was present, he mentioned at a safety meeting that the guard did not function. Aguaro stated that Mason responded that the problem would be fixed.

Mason testified that the guard had stopped working approximately three years prior to the accident but was never taken out of service. Mason conceded that the guard did not go up and down, but he believed the guard was operating effectively at the time of Zepeda's accident. He asserted that, even with the guard in the down position, the operator could control any momentary exposure to the blade by pressing the foot pedal. In addition, he contended that the saw was guarded while in the rest position or by the roof top guard located over the top of the saw.

Mason maintained that Zepeda told him after the accident that he thought the saw had self-activated prior to his accident. He stated that he informed the Division inspectors as much. Mason stated that he immediately took the saw out of service and sent it for evaluation to find out if the saw had self-activated. He learned that the saw did not self-activate but that a valve should be replaced. In the accident report he prepared on April 25, 2001, Mason concluded that Zepeda was injured when he pushed a 4' by 4' through the saw and accidentally stepped on the foot pedal, which activated the saw. Mason further concluded that Zepeda needed additional training with respect to the saw blade.

Mason testified that he did not recall hearing complaints about the guard at any of the safety meetings. According to Mason, at the time of Zepeda's injury or the inspection, he had no knowledge of a dangerous or unsafe condition on the saw. He became concerned after Zepeda was injured and took all necessary steps at that time to address his concern by sending the saw for troubleshooting.

Mason further represented that Loupe told him that, if Employer was actively working on getting a guard to correct the exposure gap, he could continue to operate the saw. He was surprised to learn that Loupe had placed an order prohibiting use on the saw during his second visit on or about July 5, 2001, given Loupe's prior representation that he could continue to use the saw if he was working on correcting the problem. Mason denied that the saw was used until after the new guard was in place. It was Mason's opinion that he was not in violation of any safety order because he was not aware that the saw posed a safety hazard or violated a safety order until the time of the opening conference on May 31, 2001.

Issues for Reconsideration

1. Did Employer raise newly discovered material evidence which it could not, with reasonable diligence, have discovered and produced at the hearing?;

2. Does the evidence justify the findings of fact and do the findings of fact support the ALJ's decision?

3. Is penalty relief based on financial hardship warranted?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the petition for reconsideration and the Division's response thereto. In light of all of the foregoing, we find that the ALJ's decision issued March 11, 2003 and the decision after remand issued August 8, 2006, were proper, and were based on substantial evidence in the record as a whole. We therefore adopt the ALJ's decision and decision after remand in their entirety. A copy of the ALJ's decision and decision after remand are attached and incorporated into our decision by reference.

In addition, we address some of the arguments raised in Employer's

petition that were not specifically addressed in the ALJ's decision, or which we believe warrant further response.

1. Employer has not presented newly discovered material evidence.

In an apparent effort to discredit the injured worker, Zepeda, Employer contends that it learned, post-hearing, that Zepeda "falsified documents, including his Social Security card and matters set out under penalty of perjury on the INS-Form I-9 that he signed in order to obtain his employment." Employer contends that it received a memorandum from American Staff Resources on November 25, 2002 indicating discrepancies between the information provided by some of Employer's workers, including Zepeda, and the Social Security Administration's database. When confronted with this information, Zepeda was unable to provide accurate information and left his employment. Employer states that it could not have known of Zepeda's "deceit" prior to the hearing and suggests that the testimony should be reconsidered in light of this new information. We disagree.

We have only the materials provided by Employer from which to consider Employer's claim, and we conclude that Employer had cause to question the validity of Zepeda's work eligibility documentation in advance of the hearing. Specifically, the form has spaces for an employee to check whether he is: (1) A citizen or national of the United States; (2) a Lawful Permanent Resident; or, (3) an Alien authorized to work. Although none of these boxes is checked, a number is listed under item (3), "Alien authorized to work" and that portion of the form is signed by Zepeda. While this would suggest that Zepeda was an "Alien authorized to work," later on the form, in section 2, which is to be completed and signed by the employer, it reads "Resident Alien." The certification for this section, made under penalty of perjury, is signed by John Mason and dated April 20, 2000. Mason's declaration submitted with Employer's petition for reconsideration further states that Zepeda presented him with a Resident Alien card, an illegible photocopy of which is included with the declaration.

We note that "Resident Alien" cards are issued to lawful permanent residents,[4] which, given that Zepeda referred to himself as an "alien authorized to work," should have given Employer pause. We are aware that Zepeda testified at the hearing through an interpreter and it is clear to us that Zepeda has, at best, limited English fluency. Nonetheless, the I-9 form for Zepeda that was supplied by Employer is in English and the space for a preparer/translator to attest to their participation in completing the form is blank. We think it unlikely that Zepeda could read and complete the form without assistance,

[4] See, e.g., www.uscis.gov, the website for the United States Citizenship Information Service, an agency within the United States government. This information is provided under "About the Form I-9", which is included under "Employer Information."

which may or may not explain the apparent inconsistency between the information provided in the two sections of the form. If Employer provided Zepeda with language assistance, then Employer failed to properly complete the form.

Given the inconsistency on the form I-9, we find that Employer could have learned, with reasonable diligence, of a problem with Zepeda's documentation, and any duplicity associated with it, in April 2000, well in advance of the hearing on this matter. We therefore decline to recognize the evidence submitted with Employer's petition as "newly discovered." See, *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *R.D. Engineering & Construction, Inc.*, Cal/OSHA App. 98-1938, Decision After Reconsideration (Aug. 29, 2001); section 390.1(a)(4).

In addition, we are unable to properly review the copies of Zepeda's work authorization documents provided by Employer because they are illegible in whole or in part. We further find that Employer failed to establish an evidentiary foundation that would allow the Board to meaningfully consider the documents submitted (e.g., no foundation was laid to demonstrate that the memorandum from American Staff Resources is admissible under an exception to the hearsay rule).

More importantly, however, we do not believe that Employer's "newly discovered evidence" is material. We do not agree that any dishonesty associated with Zepeda's submission of employment eligibility documentation renders Zepeda an inherently untrustworthy person. We would no sooner draw such a broad conclusion about Zepeda than we would conclude that Employer is inherently careless for failing to note the discrepancy on the I-9 form until an outside agency alerted it to a problem. We decline to engage in such gross over-generalizations and instead adhere to our established rule of deferring to an ALJ's witness credibility determinations barring substantial evidence that the determinations are unwarranted. *Rudolph and Sletten, Inc.,* Cal/OSHA App. 01-478 Decision After Reconsideration (March 30, 2004); *River Ranch Fresh Foods-Salinas, Inc.* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003). We see no such evidence here.

2. Does the evidence justify the findings of fact and do the findings of fact support the ALJ's decision?

a. The ALJ's Witness Credibility Determinations Are Sound.

Much of Employer's petition questions the credibility determinations made by the ALJ and suggests that the testimony should have been weighed differently. Employer makes much of inconsistencies between different witnesses' testimony and between statements made to the Division versus

testimony on the stand. While such inconsistencies exist, it is the job of the ALJ to weigh competing accounts. "[W]e will not disturb credibility findings made by the ALJ who was present at the hearing and able to directly observe and gauge the demeanor of the witness and weigh his or her statement in light of his or her manner on the stand." *River Ranch Fresh Foods-Salinas, Inc.*, *supra at p. 6.* Here, we have thoroughly reviewed the tapes and exhibits from the hearing and agree with the ALJ's credibility determinations.

We also agree with the ALJ that Cabrera's statements to Loupe are authorized admissions that constitute exceptions to the hearsay rule and are binding on Employer. (See *Macco Constructors, Inc.*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986); Evidence Code § 1222.) The fact that Cabrera contradicted those admissions when he testified does not alter their status as admissible exceptions to the hearsay rule. Rather, it creates the need for another credibility determination, which the ALJ performed and with which we concur. We further note that some of Cabrera's initial admissions[5] are corroborated in some respects by the testimony of Aguaro and Mason.

b. The Record Substantiates the Section 4306(a) Violation and the Serious, Accident-Related and Willful Classifications.

We concur with the ALJ's analysis substantiating the section 4306(a)[6] violation as well as the serious, accident-related and willful classifications, and we adopt her findings and conclusions in this Decision After Reconsideration. We also address some of the specific arguments raised in Employer's petition.

Employer's petition contends Employer could not have known that the deficient guard posed a serious danger because no injuries occurred during the 19 years that the saw was in operation and because the Division failed to post an order prohibiting use (OPU) after Zepeda's injury, which, Employer argues, indicates that the Division, itself, failed to appreciate the danger posed. We find these arguments unpersuasive.

The Division inspectors credibly testified that they did not post an OPU at the time of the May 31, 2001 inspection because they relied on Mason's

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[5] Loupe credibly testified that Cabrera told him that he could not recall the hood ever being part of the cutting cycle. He also told Loupe that the guard had worked only sporadically for the six months prior to Zepeda's accident, that the hood had not worked on the day before or the day of Zepeda's accident, and that the saw was missing a vital part. Moreover, at the hearing, Cabrera corroborated his prior statements that the guard was not coming down or working on the day of Zepeda's accident. Cabrera also told Loupe that Mason was present at safety meetings when employees told Mason of the unsafe condition of the saw.

[6] This section states, "All saws shall be effectively guarded above and below the table or roll case. The saw blade shall be fully enclosed when in the extreme back position, and the swing frame shall not pass the vertical position when at its extreme forward limit. A positive stop shall be furnished so that the saw cannot pass the front edge of the table."

assurance that the saw would not be used until the violative condition was corrected. We do not question the Division's discretion to trust an Employer's word, and find no reason to question the veracity of the Division's testimony. In contrast, we share the ALJ's suspicion of Employer's position that the Division allowed it to continue to use a saw that had just caused an amputation, so long as Employer was working hard to fix the guard.

Moreover, the fact that an employer has been fortunate enough to avoid an injury for an extended period does not mean it could not have known of the hazard. On the contrary, the Board has held that unguarded machine parts that are in plain view constitute a serious hazard because an employer can detect them through the use of reasonable diligence. *New England Sheet Metal Works,* Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005); *Chicken of the Sea International,* Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 28, 2003). A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. *Id.*. There is no question that Employer's unguarded saw blade was in plain sight.

We also concur with the ALJ's analysis sustaining the willful classification of the violation and we believe that Employer's petition supports this finding, as well. Although Employer's petition continues to assert that the nature of the violation was not discussed with it during the Division's May 31, 2001 opening conference, the petition also defends Employer by asserting: "Employer took steps to conform the hood guard as per the inspectors' recommendations [which] only establishes that he was cooperating with their suggestions of May 31, 2001." Employer's efforts to comply with the Division's suggestions made at the opening conference indicate that Employer *was* informed of the hazard at that time. Employer, however, did not take these steps until after Loupe's July visit to the workplace, all of which supports the willful classification. We concur with the ALJ that the inspector's inability to specifically identify the safety order at issue during the opening conference, as Employer claims, is not controlling; they identified the violative condition, yet Employer opted to continue to operate the saw despite the Division's admonition.

Because we sustain the willful classification of the violation, we deny Employer's appeal of the assessed penalty and uphold the ALJ's finding that the proposed penalty of $70,000 is reasonable. [7]

[7] While we agree that the penalty is properly assessed, we note that section 336(h), which pertains to penalties for willful violations, requires that the penalty be multiplied by 5, not 10 as originally proposed by the Division. Multiplying $15,750 by 5 results in a total penalty of $78,750, which is still beyond the maximum penalty of $70,000 established by section 336(h). Thus, the $70,000 penalty remains appropriate.

c. The Independent Employee Action Defense Does Not Apply.

We further concur with the ALJ's analysis of the Independent Employee Action Defense and adopt her findings and conclusions in this Decision After Reconsideration. Employer's petition, however, claims that it successfully asserted the defense because: it had an established safety program that included training; and Zepeda's testimony demonstrates that it effectively communicated its policy. This, alone, does not support the defense. Zepeda's lack of experience in using the saw in question to cut wood is undisputed and element one of the defense requires the employer to prove that the employee was experienced in the job being performed. *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). Because failure to prove any one of the elements of the defense renders the defense inapplicable, Employer cannot successfully assert it here. *Gal Concrete Construction Co.,* Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990); *Central Coast Pipeline Construction Company, Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).

d. The Record Supports the Decision's Findings on the Section 3203(a)(7) violation.

We adopt the ALJ's findings and conclusions regarding the section 3203(a)(7) violation in this Decision After Reconsideration.

3. <u>Penalty Relief Based on Financial Hardship is Unwarranted</u>

At the hearing, Employer testified that the company's monthly gross income is $160,000 with monthly payroll for 25 employees between $45,000 and $50,000. Monthly rent is approximately $8,400. Employer has two small business loans and another business loan totaling $260,000. Monthly payments for these loans total $4,000. Mason provided no documentation to support the company's financial condition.

Mason could not state whether the company could afford to make payments over time. He added that bankruptcy would be likely if the company were forced to pay the penalties.

Subsequent to the ALJ's decision being rendered in this matter, the Board issued a Decision after Reconsideration (DAR) in which we addressed the issue of financial hardship. In *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (March 27, 2006), we held that, in each case, an ALJ or the Board itself must determine whether the evidence rebuts the presumption that the penalties proposed by the Division are reasonable. The weight given to such evidence or components of the evidence should be determined on a case by case basis, although the trier of fact must always be

mindful of certain basic principles, such as whether the penalty ultimately imposed furthers the remedial purposes of the Act, or whether it strikes an appropriate balance between punishment and remediation. There is no fixed formula for making that determination.

We further held that correction of unsafe working conditions should be encouraged, and punishment as the sole inducement for change is disfavored. In some cases, an employer's distressed financial condition may warrant assessing a lower penalty to induce safety efforts and future compliance than would be the case if the same employer were not under such hardship. Such economic factors should not, therefore, be disregarded as irrelevant to the issue of "reasonableness of the proposed penalty."

In *Stockton Tri*, we stated that similar principles are to guide the Board and the ALJs in determining whether an installment payment plan will effectuate the purposes of the Act. The burden of proof is on the employer requesting financial relief. Each applicant must present sufficient factual information to enable an ALJ or the Board to make a proper decision. The ALJ must exercise discretion in determining the adequacy of necessary information to permit granting of financial relief and/or a reasonable installment payment program.

Further, the Board or the ALJ may consider additional factors such as: the employer's conduct in addressing worker safety; the installment payment amount in relation to the total penalty amount; the employer's financial condition; the size of the employer; abatement and continuing efforts to correct violations and maintain a safe work environment.

Because this matter was pending reconsideration on issues including financial hardship relief when the Board's DAR in *Stockton Tri Industries, Inc.* issued, the Board remanded the case to the ALJ to evaluate whether financial hardship relief should be granted in light of that DAR. The ALJ issued a Decision after Remand, dated August 8, 2006, in which she applied the reasoning in *Stockton Tri* and concluded that financial hardship relief was unwarranted because Employer's testimony demonstrated its ability to pay the penalty and Employer presented no documentation to rebut the presumption that the proposed penalty was reasonable.

We agree with the ALJ that Employer failed to meet any of the conditions or criteria we have set forth for granting financial relief. Employer has not demonstrated that its financial obligations are so dire that payment of the penalties would impact its ability to continue to operate its business. Employer's evidence demonstrates it was generating in excess of $1.9 million in annual revenue. Given the sales volume, the reported expenses do not appear to be unusual or unreasonable. The likelihood of being able to generate

sufficient funds to pay a fine is most probable. A threat of bankruptcy does not rise to the level of inability to pay based on an employer's debt ratio to income or an actual discontinuance of business operations.

We are also mindful that where a willful serious violation has been sustained, it cannot be said that Employer has shown the requisite concern for employee safety to support a penalty reduction based on financial hardship. The evidence and the ALJ's findings are ample for the Board to determine that Employer expressed a callous approach to employee safety, especially after being notified of the existence of a hazard that could cause serious injuries. Employer's request for penalty reduction based on financial hardship is denied.

Decision After Reconsideration

Employer's appeal is denied. We affirm the decision of the ALJ on all substantive issues and deny Employer's request for financial relief.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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